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NOS. 16-649, 16-1023

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, et al.,

Appellants,

v.

SANDRA LITTLE COVINGTON, et al.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

APPELLANTS' SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

The two appeals under this caption present three distinct questions, none of which is answered by this Court's recent decision in *Cooper v. Harris*, No. 15-1262 (May 22, 2017). The first appeal, No. 16-649, asks whether the district court committed legal error by refusing to give preclusive effect to an on-point decision by the North Carolina Supreme Court and, if not, whether the district court erred by holding that the North Carolina legislature lacked a strong basis in evidence to design *any* of its state legislative districts as ability-to-elect districts of any kind. The decision in *Cooper* does not address or resolve either of those questions—its preclusion holding was based on a factual quirk not present here, and its strict-scrutiny holding answered a question the court below did not reach. Accordingly, nothing in *Cooper* diminishes the case for plenary review of the first appeal.

The second appeal, No. 16-1023, asks whether the district court erred when it invalidated past election results and ordered off-year special elections throughout the State. Nothing in *Cooper* addresses the appropriate remedy for a racial gerrymandering violation or sheds any light on whether the district court's extraordinary remedial order was warranted. The district court in *Cooper* found violations but did not order special elections as a remedy. Thus, the remedial question in the second appeal did not arise. Accordingly, if this Court does not summarily reverse or note probable jurisdiction in the first appeal, it should exercise one of those options in the second appeal. Any other disposition would endorse the

district court's and plaintiffs' untenable and unprecedented view that special elections are *always* appropriate remedies for *Shaw* violations, notwithstanding the significant harms they inflict on state sovereignty and the significant strain they place on state resources.

I. The Decision In *Cooper* Does Not Resolve The Merits Questions In This Case.

In *Cooper*, this Court affirmed the district court's decision invalidating two North Carolina congressional districts. Two aspects of the *Cooper* decision merit discussion here. First, this Court held that the North Carolina Supreme Court's decision in *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), did not preclude the *Cooper* lawsuit as a matter of claim or issue preclusion. *Cooper*, slip op. 7-9. That holding was based on the Court's view that there was a factual flaw in the State's privity submission: "North Carolina never satisfied the District Court that the alleged affiliation [between the organizational plaintiffs in *Dickson* and the individual plaintiffs in *Cooper*] really existed." *Id.* at 8. That factual flaw obviated any need to answer the question at the core of the State's preclusion argument—*i.e.*, whether a fully litigated lawsuit by an organization precludes a functionally identical lawsuit by members of that organization. This Court expressly reserved that legal question. *See id.* at 9 ("We need not decide whether the alleged memberships would have supported preclusion if they had been proved.").

That legal question is squarely presented here. Plaintiffs conceded—both in their depositions and in their motion to affirm—that some of them "are

members of organizations that were plaintiffs in *Dickson*." MTD1.38; JS1.14-15 & n.2.[1] Accordingly, the factual predicate to preclusion that was lacking in *Cooper* is present here, and this case cannot be resolved without deciding the question that *Cooper* left unresolved. That alone merits plenary review. This Court should note probable jurisdiction and decide whether organizations may take a second (and third and fourth) bite at the apple by sending their members to fight redistricting battles the organizations already fought and lost.[2]

Second, this Court held that North Carolina's Congressional District 1 did not satisfy strict scrutiny because the State's belief "that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district" was not grounded in a strong basis in evidence. *Cooper*, slip op. 17. Critically, the Court *did not* hold that the State lacked a strong basis in evidence to consider race *at all* in drawing District 1. Rather, it took issue only with the legislature's decision to "augment," "boost," or "ramp up" the district's BVAP. *Id.* at 14-17 & n.5. In other words, even if the legislature had good reasons to fear a Section 2 violation if it ignored race altogether, this Court held that the State erred in believing that it needed to draw

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[1] "JS1" and "MTD1" refer to the jurisdictional statement and motion to dismiss in No. 16-649; "JS2" and "MTD2" refer to the jurisdictional statement and motion to dismiss in No. 16-1023.

[2] This case also includes a second basis for privity: The *Dickson* lawsuit was organized and funded by The Democracy Project II, which also organized and funded this lawsuit. JS1.15-16; JS1.Reply.3-4.

District 1 as a majority-minority district to remedy that potential violation.

That holding has no bearing on this appeal. The district court in this case never decided whether the legislature had good reasons to increase the BVAP of the challenged state legislative districts. Instead, the district court rested its decision on the antecedent holding that the legislature lacked "a strong basis in evidence for *any* potential Section 2 violation *at all*." JS1.30. That is, the district court prohibited the legislature not only from converting supposed crossover or coalition districts into majority-minority districts (as in *Cooper*), but also from intentionally creating or maintaining any ability-to-elect districts whatsoever—*i.e.*, from considering race *at all* in drawing district lines. The district court reached that extraordinary holding even though the legislature received uncontradicted evidence confirming the existence of racially polarized voting throughout the State, JS1.24-29, and even though plaintiffs conceded that the State likely would face Section 2 liability if it did not consider race in drawing district lines, JS1.30-34.

That holding goes far beyond anything this Court suggested in *Cooper*, and it could have dire consequences for minorities in North Carolina. The General Assembly currently has more African-American members than at any other point in the State's history, and that success is in no small part owing to the State's diligent efforts to create and maintain majority-minority districts as part of its good-faith efforts to comply with the Voting Rights Act as interpreted by this Court. If the State cannot

continue to take race into account when drawing lines even in districts that have been considered *Gingles* districts for decades, then there is a very real prospect that this progress will not continue.

Yet that is precisely the result that affirming the decision below threatens to bring about. If this Court does not correct the district court's error, North Carolina will be inescapably "trapped between the competing hazards of liability" under the Voting Rights Act and the Constitution. *Bush v. Vera*, 517 U.S. 952, 977 (1996). The district court's constitutional holding would forbid the State from considering race in drawing district lines, while the Voting Rights Act would require it to do exactly that to prevent vote dilution in already-existing ability-to-elect districts. JS1.33-34. If that is the real consequence of this Court's jurisprudence, then there seems to be just one way out—*i.e.*, for the State on remand to blind itself to race altogether and then defend against the inevitable Section 2 claim by challenging the constitutionality of the VRA. After all, if what Section 2 affirmatively commands is forbidden by the Fourteenth Amendment, then this Court must either construe the VRA as inapplicable to redistricting, *cf. Cooper v. Harris*, No. 15-1262 (Thomas, J., concurring), or invalidate it as unconstitutional.

To avoid those undesirable consequences, this Court should summarily reverse the district court insofar as it held that North Carolina lacked good reasons to consider race at all, and then remand for consideration of whether the State had good reasons

to increase the BVAPs of the challenged districts.[3] In the alternative, the Court should note probable jurisdiction and clarify the extent to which States may or must consider race while redistricting.

II. Regardless Of How This Court Resolves The Merits Appeal, The District Court's Remedial Order Cannot Stand.

Regardless of how this Court resolves the merits appeal, it should summarily reverse or note probable jurisdiction over the district court's doubly flawed remedial order. The district court lacked jurisdiction to issue that order because the State's previously filed notice of appeal divested the court of power to expand upon its previously ordered remedy. JS2.12-16. And the district court lacked justification for the remedial order because this simply is not the extraordinary case that might justify the federalism-obliterating remedy of invalidating election results and ordering off-year special elections throughout the State. JS2.16-31. Indeed, all the reasons why a special election is unwarranted have only intensified since this Court granted an emergency stay of the remedial order, as forcing the State to hold special elections on what would now be an extraordinarily expedited schedule would impose massive costs on

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[3] The state legislative districts at issue in this case do not share the electoral history of Congressional District 1, which this Court described in *Cooper* as "an extraordinarily safe district for African-American preferred candidates" even with a BVAP below 50%. Slip op. 13. For example, from 2004 to 2008, African-American candidates ran for a House seat 23 times in majority-white districts and won only three times, and not a single African-American candidate was elected from a majority-white district in 2010. JS1.28.

the state fisc and inflict untold harms to state sovereignty.[4]

More to the point, nothing in the *Cooper* decision addresses the appropriate remedies for racial gerrymandering violations, and so nothing in that decision answers the questions presented in the second appeal. And those questions are weighty indeed: Plaintiffs' position is that special elections are *always* appropriate remedies for *Shaw* violations, notwithstanding the significant harms they inflict on state sovereignty and the significant strain they place on state resources. Plaintiffs even go so far as to claim the district court was *required* to order a special election, even though the remedy in every one of this Court's *Shaw* cases has been limited to ordering new plans for the next regularly scheduled election. *See* JS2.Reply.5-7. Unless special elections are to become *de rigueur* in remedying *Shaw* violations, this Court should summarily reverse or note probable jurisdiction over the remedial order.

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[4] The State previously volunteered to brief and argue this case on an expedited schedule, *see* Emergency Application For Stay Of Remedial Order, *North Carolina v. Covington*, No. 16A646 (Dec. 30, 2016), and it expedited completion of briefing on its merits-stage jurisdictional statement to ensure that the Court could hear argument this Term should it be so inclined. While the State remains willing to brief any aspect of this case on an expedited basis, the reality is that planning and executing a special election at this point would be exceedingly difficult (if not entirely unrealistic). If this Court notes probable jurisdiction and orders this case briefed and argued in the normal course, neither the merits nor remedial issues would be moot before this Court could decide the appeal, and the Court's opinion could provide substantial guidance on recurring issues.

CONCLUSION

This Court should summarily reverse or note probable jurisdiction over the appeals in this case.

Respectfully submitted,

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